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IN THE

Supreme Court of the United States

October Term, 1973

No. 73 - 998

TOM PARKER and MORRIE PARKER,

Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California, Judgment Affirming Judgment of the California Court of Appeal Affirming Judgment of the Superior Court of the County of Los Angeles.

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Petition for Writ of Certiorari to the Supreme Court of the State of California, Judgment Affirming Judgment of the California Court of Appeal Affirming Judgment of the Superior Court of the County of Los Angeles.

This is a petition of Tom Parker and Morrie Parker for a Writ of Certiorari to review the judgment and order made by the Supreme Court of California on September 26, 1973, affirming the judgment of the Court of Appeal which on July 31, 1973, had affirmed the judgment against Petitioners made and entered on February 16, 1972, by the Superior Court of the County of Los Angeles, after a jury had found Petitioners guilty of having violated California Penal Code Section 288a (oral copulation).

The Supreme Court of California did not file a written opinion. An order denying Petitioners' request for a hearing in that Court is attached hereto as Appen-

dix "A". The opinion of the Court of Appeal affirming the judgment of conviction was not officially reported but a copy of said opinion is attached hereto as Appendix "B".

Jurisdiction.

The Superior Court for the County of Los Angeles had jurisdiction of this cause by virtue of California Penal Code Section 288a.

The California Court of Appeal and the Supreme Court of California had jurisdiction by virtue of California Penal Code Section 288a, California Constitution, Article VI, §12, and California Rules of Court 28, 29.

This Court has jurisdiction under Title 28, United States Code, Section 1257(3) to review the judgment in question.

Statement of the Case.

Petitioners were originally charged with having conspired to commit an act of oral copulation and with having aided and abetted in said act in connection with the production and direction of a motion picture. Petitioners were also charged with having conspired to sell approximately 99 allegedly obscene motion picture films.

Petitioners pleaded not guilty and were tried by a jury in the Supreme Court of the County of Los Angeles. Prior to the commencement of trial, Petitioners filed a Motion to Dismiss the charges alleging that California Penal Code Section 288a was unconstitutional on its face and as construed and applied to them. The motion was denied.

The jury found Petitioners not guilty of conspiring to sell obscene films, concluding that the films, including the one in which the act of oral copulation had taken place, were not obscene. Nevertheless, on February 16, 1972, Petitioners were found guilty by a jury of having violated Penal Code Section 288a.

On July 31, 1973, the California Court of Appeal affirmed the judgments of conviction. On September 26, 1973, the California Supreme Court refused to grant Petitioners' hearing, thereby affirming the judgments of conviction.

Questions Presented.

1. Whether Petitioners have standing to attack the constitutionality of California Penal Code Section 288a on its face.

2. Whether California Penal Code Section 288a is facially unconstitutional.

Statute Involved.

California Penal Code Section 288a provides in pertinent part as follows:

> "Any person participating in an act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment in the state prison for not exceeding 15 years or by imprisonment in the county jail not exceeding one year; . . ."

Statement of the Facts.

During the course of an investigation into the production and sale of motion picture films containing explicit sexual acts, an officer of the Los Angeles Police De-

partment was present on a sound stage and observed Petitioner Tom Parker directing a scene in which an act of oral copulation took place. Thereafter, officers executed a search warrant and seized approximately 99 motion pictures including the one which the officer had seen being shot.

Prior to trial, Petitioners sought to have Penal Code Section 288a declared unconstitutional. In support of their motion, they introduced the testimony of some 6 qualified experts, including two Professors of Psychiatry, a Sociologist specializing in sex research, a marriage counselor, a clinical psychologist and an ordained Methodist Minister, all of whom testified that oral copulation is a normal and natural sexual act and that it is engaged in by a majority of the American population. The motion was denied.

During the trial, the jury was shown approximately 8 hours of films all of which contained acts of oral copulation. It was stipulated that the 8 hours of film were representative of all of the films seized. The jury acquitted Petitioners of having conspired to sell obscene films, concluding that the films were not obscene. Petitioners were, however, convicted of having violated Section 288a.

REASONS FOR GRANTING THE WRIT.

A. California Penal Code Section 288a Is Unconstitutional on Its Face Being Violative of the First, Ninth and Fourteenth Amendments to the United States Constitution.

Petitioners are challenging the constitutionality of a state penal statute which on its face provides that all persons who engage in an act of oral copulation, be they husband and wife or consenting single adults, are guilty of a felony. The statute makes no exception for such persons and no judicial construction has sought to limit the statute's application.

In the trial Court Petitioners developed an unimpeached record conclusively demonstrating that acts of oral copulation are a normal and natural part of our culture engaged in by a majority of adults. Thus, the record is clear that there is no rational basis in fact for the flat prohibition against oral copulation.

As a starting point, we would submit that given the zone of marital privacy created by this Court in *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678 (1965), it cannot be held that the prohibition found in Section 288a against oral copulation, can constitutionally be applied to married people in the privacy of their bedroom. Yet the statute in question clearly makes it a crime for all persons to engage in such an act.

In *California v. La Rue,* 93 S.Ct. 390 (1972) Mr. Justice Marshall observed that: "I have serious doubts whether the state may constitutionally assert an interest in regulating any sexual act between consenting adults. Cf. *Griswold v. Connecticut,* 381 U.S. 479 (1965) . . ." Petitioners submit that Mr. Justice Marshall's

doubts are well founded and that the time has come to decide this important issue of personal liberty.

If this Court should now agree that under *Griswold* states may not make it a crime for married couples to engage in acts of oral copulation, then the entire California statute must be found to be constitutionally deficient under the ruling of *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029 (1972). For *Eisenstadt* makes it clear that by virtue of the equal protection clause of the Fourteenth Amendment states may not afford special rights, privilege or immunities to married couples and deny them to single adults.

B. Petitioners Have Standing to Attack the Constitutionality of the Statute on Its Face.

As we have noted above, Section 288a makes no provision for specific application to those who engage in acts of oral copulation in public or during the filming of motion pictures and clearly seeks to punish all persons who engage in oral sex. This Court has previously held that when an activity sought to be proscribed is as fundamental as an adult's right to choice of sex act, and when the statute is as broad as the one challenged at bar, then anyone prosecuted for violating the statute may attack it on its face. In *Eisenstadt v. Baird*, this Court held that one who was convicted of exhibiting contraceptive articles in the course of a *public* lecture on contraception to a group of students at Boston University and for giving a woman a package of vaginal foam at the conclusion of his lecture, had standing to attack an anti-birth control dissemination statute on its face. The government argued that the appellee did not have standing to assert the rights of unmarried persons denied access to contraceptives because he was

neither a single person nor an authorized distributor of contraceptives. Furthermore, it should be noted that the appellee in *Eisenstadt* was not seeking to use contraceptives *privately* but was *publicly* distributing them. Despite these facts, this Court held that the appellant had standing to attack the statute on its face and to raise the rights of unmarried persons. The Court reasoned that clearly appellee had a sufficient interest in challenging the validity of the statute to satisfy the case or controversy requirement of Article III of the Constitution.

The government further argued, as have the People in the Courts below, that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." In denying this contention, this Court held that:

> "The Court of Appeals held that the statute under which Baird was convicted is not a health measure. If that view is correct, we do not see how Baird may be prevented, because he was neither a doctor nor a druggist, from attacking the statute in its alleged discriminatory application to potential distributees. We think, too, that our self-imposed rule against the assertion of third-party rights must be relaxed in this case just as in *Griswold v. Connecticut, supra.*"

The Court concluded by observing that the relationship between Baird and those whose rights he sought to assert was the relationship between "an advocate of the rights of persons to obtain contraceptives and those desirous of doing so." And in a very real sense, Peti-

tioners herein are advocates of the rights of all those consenting adults in California who wish to engage in oral genital sex. Indeed, the pre-trial testimony on Petitioners' Motion to Dismiss clearly demonstrated not only the absolute necessity for some people to engage in oral genital sex, *i.e.* paraplegics and others with spinal cord injuries who are unable to engage in any other type of sex, but also the desirability of films depicting oral sex as a tool of sex education.

Conclusion.

Petitioners are asking this Court to review and declare unconstitutional a statute of the State of California which on its face prohibits adults from engaging in acts of oral copulation, and makes such conduct a felony. The record developed below makes it abundantly clear that there is no rational basis for the statute.

It is appropriate, however, to indicate in conclusion that by this Petition these Petitioners are not seeking to invalidate California's right to make it a public offense to (1) engage in acts of oral copulation in public; (2) force anyone to engage in an act of oral copulation, or (3) engage in an act of oral copulation with a minor. All of these acts are presently prohibited by statute in California and are clearly constitutionally valid. Likewise, pursuant to this Court's opinion in *Miller v. California*, 93 S.Ct. 2607 (1973), California could, if it desires, make it an offense to show an act of oral copulation in film.

However, the statute in question makes no effort to delimit its scope and is meant to apply to all citizens regardless of their status and regardless of where they perform the act. In its present form, unmodified or limited by any judicial opinion from California's highest Court, Penal Code Section 288a unmistakably is violative of the First, Ninth and Fourteenth Amendments to the Constitution of the United States.

Respectfully submitted,

ANTHONY MICHAEL GLASSMAN,
Attorney for Petitioners.

APPENDIX "A".

Order Denying Hearing After Judgment by the Court of Appeal, 2nd District, Division 1, Crim. No. 22547.

In the Supreme Court of the State of California in Bank.

Order Due September 28, 1973.

People v. Parker et al.

Appellants' petition for hearing DENIED.

Burke, Acting *Chief Justice*

I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 21st day of Dec. A.D. 1973.

By /s/ [Illegible], Deputy Clerk.

APPENDIX "B".

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division One.

The People of the State of California, Plaintiff and Respondent, v. Tom Parker and Morrie Parker, Defendants and Appellants. No. 2d Crim. 22547 (Sup. Ct. Nos. A-270417; A-274764; A-278592).

Filed July 31, 1973.

APPEAL from judgments of the Superior Court of Los Angeles County. David N. Eagleson, Judge. Affirmed.

Miller, Glassman & Browning Incorporated for Defendants and Appellants.

Evelle J. Younger, Attorney General, Edward A. Hinz, Jr., Chief Assistant Attorney General, William E. James, Assistant Attorney General, Frederick R. Millar, Jr. and William R. Pounders, Deputy Attorneys General, for Plaintiff and Respondent.

A. L. Wirin, Fred Okrand, Laurence R. Sperber, and John D. O'Loughlin of the American Civil Liberties Union of Southern California as Amici Curiae on behalf of Defendants and Appellants.

In consolidated appeals from three judgments of conviction of conspiracy to violate Penal Code section 288a (oral copulation) and several counts of violation of that statute, appellant Tom Parker contends that section 288a is: (1) unconstitutional as a violation of a protected right of privacy; and (2) does not prohibit oral copulation performed in connection with a theatrical performance. In his appeal from a judgment of conviction of one count of conspiracy to violate Penal

Code section 288a and one count of violation of the statute, appellant Morrie Parker joins in the contentions of his coappellant and argues also that his conviction is not supported by substantial evidence. On the authority of *People v. Drolet*, we conclude that Penal Code section 288a is constitutional and applies to conduct performed in connection with a theatrical performance. We conclude also that substantial evidence supports the conviction of appellant Morrie Parker.

Constitutionality and Construction of Penal Code Section 288a

Appellants contend that Penal Code section 288a defining oral copulation as a felony is unconstitutional because it violates the protections of the First and Ninth Amendments to the United States Constitution and denies equal protection of the law. They contend also that the statute must be construed to exclude from its prohibition oral copulation in the course of a theatrical performance because of the rule of *Barrows v. Municipal Court*, 1 Cal.3d 821 [83 Cal. Rptr. 819, 464 P.2d 483].)

Substantially identical contentions have recently been rejected by the Court of Appeal in *People v. Drolet*, 30 Cal.App.3d 207 [105 Cal. Rptr. 824]. The authority of *Drolet* requires that appellants' contentions be rejected here.

Sufficiency of Evidence—Morrie Parker

Appellant Morrie Parker contends that the evidence is insufficient to support his conviction. We recite here only that portion of the record which pertains to Morrie Parker's involvement doing so in the manner which

resolves all conflicts in the evidence in favor of the judgment and which draws all permissible inferences in its support (*People v. Gardner*, 71 Cal.2d 843, 850 [79 Cal. Rptr. 743, 457 P.2d 575].)

On February 2, 1971, Officer William J. Riddle of the Los Angeles Police Department responded by telephone to an advertisement in Daily Variety offering for sale 16 millimeter "adult" films. As requested by a woman to whom he talked Riddle gave a name, telephone number, address, and business references. He asked about the films and was told that they consisted of three movies of "simulated adult action," nine of "advanced adult action," and thirty-seven of "very advanced adult action." Subsequently appellant Tom Parker called for Riddle and left a telephone number where he could be contacted. Riddle returned the call and arranged to meet Tom Parker.

Pursuant to the arrangement Riddle met with Tom Parker on February 27. Parker after exhibiting a portion of a "hard core" film in a viewer offered to sell the advertised films to Riddle for a price of $250,000.00. A further meeting was arranged for March 1 to which Riddle took Officer Dixon and Policewoman Miller whom he introduced as coventurers. A screening of the films was scheduled for March 2. At the screening appellants Morrie and Tom Parker exhibited about 15 films to Officers Dixon and Miller. That evening the two officers were taken to the Cave Theatre to see two of the motion pictures then being publicly exhibited. On March 3 Tom Parker asked Officer Riddle whether he was going to buy the films. Riddle said that he intended to do so but no price was agreed upon.

On March 4 appellant Morrie Parker and his brother Rick Parker who is not a party to these proceedings conveyed Riddle and Dixon to a sound stage at 663 North Berendo Street where a motion picture, "Tony's Erotic Botique" was being made. Tom Parker acted as both cameraman and director. Riddle, Dixon, Tom Parker, Morrie Parker, and Rick Parker left the stage at a break and went to a nearby restaurant to negotiate the sale and purchase of the films. Riddle agreed to purchase 20 of the motion pictures for $110,000.00 of which $10,000.00 was allocated to a 90 day option to purchase 30 additional films for a price of $140,000.00. Morrie Parker participated in the conversations concerning the sale. He stated that he must leave to interview actors and cast the picture. Tom Parker instructed Morrie Parker to "make sure you get Shelley for tomorrow's shooting." Appellant Tom Parker invited Riddle to return to the sound stage at 10 p.m. to observe further filming of "Tony's Erotic Botique."

At Riddle's instruction Officer Joseph F. Ganley conducted a surveillance of the stage at 663 North Berendo. Between 5 and 5:15 on March 4 he saw Morrie Parker drive up in an automobile with Shelley and another woman. The three entered the door of the stage. The two women subsequently performed in "Tony's Erotic Botique." Shelley and probably the other women conveyed to the set by Morrie Parker were observed by Officer Riddle, when he later visited the set, to engage in acts of oral copulation at the direction of Tom Parker.

The jury found Morrie Parker guilty of conspiracy to commit oral copulation and guilty of the substantive count upon which the conspiracy was based. On this

appeal Morrie Parker argues that the convictions are not supported by substantial evidence.

In essence the sufficiency of the evidence to support the convictions of Morrie Parker on both counts of which he was found guilty stands or falls upon the adequacy of evidentiary support for the conspiracy conviction. If that evidence meets the required test then it also supports the conviction of violation of Penal Code section 288a on the theory that Morrie Parker aided and abetted Shelley in the proscribed conduct. We conclude that the evidence is sufficient.

A conspiracy to commit a crime may be established by circumstantial evidence in the nature of acts and conduct in mutually carrying out a criminal purpose. (*People v. Scott*, 244 Cal.App.2d 146, 151 [36 Cal. Rptr. 402].) Here the agreement to violate Penal Code section 288a appears from the context in which the violation occurred. The jury could properly infer from the circumstances that the acts of oral copulation performed by Shelley at Tom Parker's direction were motivated by two purposes, one the production of an "adult" movie, and the other as part of a sales plan to induce purchasers to pay a large sum of money for films. Morrie Parker's participation in the conspiracy was properly inferred from evidence that he assisted in the sales plan, that he, at Tom Parker's instruction, cast Shelley for the part, and that he conveyed Shelley and another woman to the sound stage, the location of the acts of oral copulation. Morrie Parker's knowledge of the nature of the conduct that would be

filmed is further evidenced by his familiarity with the content of the other films offered for sale.

We thus conclude that the evidence before the trial court was of such a character as to justify a reasonable trier of fact in finding Morrie Parker guilty beyond a reasonable doubt of the crimes charged against him. (*People v. Reilly*, 3 Cal.3d 421, 425 [90 Cal. Rptr. 417, 475 P. 2d 649].)

Disposition

The judgments are affirmed.

NOT FOR PUBLICATION

Thompson, *J.*

We concur:

Wood, *P. J.*

Lillie, *J.*

SUPREME COURT, U. S.

Supreme Court, U. S.
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MICHAEL [illegible], JR., CLERK

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Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF RESPONDENT IN OPPOSITION

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BRIEF OF RESPONDENT IN OPPOSITION

Questions Presented

1. Whether petitioners have standing to attack the constitutionality of California Penal Code section 288a on its face.

2. Whether California Penal Code section 288a is facially unconstitutional.

Statement of the Case

This case arises from the consolidation of three separate prosecutions in the Los Angeles Superior Court. The first case, No. A270417, was a trial by jury in which petitioners were found guilty of one count of conspiracy to commit the crime of oral copulation,

a violation of section 182 of the California Penal Code, and one count of oral copulation in violation of section 288a of the California Penal Code. The conspiracy charge was declared to be a misdemeanor, and probation was granted on both counts for a term of five years upon condition, among others, that petitioner Morrie Parker pay a fine of $750 and petitioner Tom Parker pay a fine of $500.

Case No. A274764 was submitted on the testimony contained in the transcript of the preliminary hearing and resulted in a finding of guilt of petitioner Tom Parker on 13 counts of violation of section 288a of the Penal Code. Probation was granted for a period of five years on condition, among others, that petitioner Tom Parker pay a fine of $500.

Case No. A278592 was also submitted on the transcript of the preliminary hearing and resulted in a judgment of guilt of petitioner Tom Parker on 12 counts of violation of section 288a of the Penal Code. Probation was granted for a period of five years on condition, among others, that petitioner Tom Parker pay a fine of $500.

The resulting appeals from these three convictions involved one count of conspiracy to commit oral copulation in violation of section 182 of the Penal Code and 26 counts of oral copulation in violation of section 288a of the Penal Code. These judgments of conviction were affirmed by the Court of Appeal of the State of California, Second Appellate District, Division One, on July 31, 1973. A petition for hearing by the Supreme Court of the State of California was denied on September 26, 1973.

Statement of Facts

The following facts are taken from Case No. A270417, which was tried by a jury. They are presented in condensed form as representative of all three consolidated cases here being challenged.

In response to an advertisement in Daily Variety magazine offering the sale of 49 feature length, 16 millimeter adult films, Los Angeles Police Officer William Riddle, operating in an undercover capacity, telephoned the number listed and arranged a meeting with someone responding as "Tom Parker." On Saturday, February 27, 1971, Officer Riddle arrived at 310 North San Vicente and met petitioner Tom Parker, who soon led Officer Riddle through his suite of offices to a room which contained numerous cans of film and films on a table which also contained a moviescope. The film being edited depicted a large living room containing six couples, five of these couples being male-female and one couple being female-female. These six couples were engaged in various sexual activities, most of which involved oral copulation.

In one scene a male who appeared to be a narrator came onto the set and said something to the effect, "Hello, I'm an artist," explaining that his business was erotic art. He referred to erotic pictures around the room, and then said, "I hire these people to come and do these things, and they're an inspiration for my art." As he narrated and walked among the group, for example, he patted one of the females on the buttocks and said, "Are you having a good time?" and she said, "Oh, wonderful." Also during this portion there were numerous groans and almost animal grunts and slurping noises.

On one occasion one of the males who was in a partial standing position adjacent to a couch, took a glass of liquid and poured it on the anus of one of the females, who simultaneously had her mouth over his penis. After doing this, he leaned over her and began to lick and suck the liquid on her anus.

Petitioner Tom Parker stated that he had recently purchased a theatre called the Yale in Santa Monica which had been in operation for several months and had been very successful financially. He said that even more recently he had purchased the Cave Theatre in Hollywood, and that when he became financially successful or solvent, reaching an income of $13,000 a week, he tooks his sons, Morrie [Petitioner Morrie Parker] and Rick, as partners to manage the theatres while he produced the movies.

Officer Riddle told petitioner Tom Parker that after seeing the films, he would have to meet with his financial backers and discuss the terms of the sale. Petitioner Tom Parker provided a list of the various titles in the inventory, saying that he had "expensed out the film" and that with the $250,000 he was asking he intended to purchase 10 theatres across the nation in which to show his films.

On Thursday, March 4, at approximately 2:30 p.m., Officer Riddle met petitioner Tom Parker at 663 North Berendo Street in Los Angeles. Officer Riddle was led to that address by petitioner Morrie Parker and Rick Parker. The Berendo Street address was a sound stage. Petitioner Tom Parker was "manning a movie camera." There were numerous actors, actresses, or other persons standing around. Petitioner Tom Parker was giving instructions to three persons on the set, and Vern

Barney was assisting with electrical equipment and a directional microphone. Petitioner Tom Parker told a man known to be Tony Deluca to sit on a stool next to a sign which read "Tony's Erotic Boutique." He gave directions to a female named Shelly Silver to be rummaging through some clothes on a rack, and to another female by the name of Sharon Fields, who was in what appeared to be a clothes changing booth.

The camera was running and the participants said exactly what petitioner Tom Parker told them to say. Tony Deluca stated, "Hello. My name is Tony." Shortly thereafter a second scene started wherein Sharon Fields came out of the booth and said, "You're not going to fuck that girl." Then Shelly Silver said, "What makes you think I want to fuck him anyway." Deluca then said, "They're really kidding. They both love me." Shortly, thereafter, petitioner Tom Parker took a break and he with his two sons, Rick and petitioner Morrie Parker, accompanied Officer Riddle to a nearby restaurant where they discussed the sale of films.

Officer Riddle subsequently returned to the sound stage at 10:00 p.m. with petitioners' attorney. Upon entering the sound stage, Office Riddle saw what appeared to be a dinner break in progress. The attorney stated that he should draw up a rough contract of some kind, and petitioner Tom Parker said that he would talk to him the following day.

Officer Riddle observed the activity on the sound stage that evening. The scene involved a single bed and two females, Shelly Silver and Rebecca Moreland. Petitioner Tom Parker called the cast together and instructed the two women to assume the positions they had been in prior to the break. To Shelly he stated,

"No, you were not wearing boots, you were completely nude." He instructed Barney on lighting and the sound apparatus. He then gave specific instructions to the nude women, such as where they were to sit and what positions they were to assume. He told them to insert their fingers into each other's vagina during the course of the next few minutes. He instructed them to perform various acts, including copulation, sucking each other's breasts, and masturbating each other using several fingers. He instructed them specifically how to kiss each other's vagina and breasts. On numerous occasions he would tell them how to position their legs and their faces.

As the film was rolling, petitioner Tom Parker would generally refrain from instructions. From time to time he would whisper instructions or stop the camera and tell them, "Now in the 'climax scene,' let your kisses be drooly." On one occasion Shelly Silver asked, "Can I say fuck now." Petitioner Tom Parker said, "Yes, why don't you say 'fuck me, fuck me' and you (referring to Rebecca) state, 'I am, I am.'" The two women did as instructed. At approximately 11:00 p.m., Officer Riddle walked over to petitioner Tom Parker while he was still filming and whispered that he was leaving.

On Saturday, Officer Riddle went to petitioners' offices with a search warrant and seized various evidence, including approximately 105 films.

ARGUMENT

I

Petitioners Do Not Have Standing to Attack the Constitutionality of Penal Code Section 288a on Its Face

Citing *Eisenstadt v. Baird,* 405 U.S. 438 (1972), petitioners claim the right to attack Penal Code section 288a on its face as "advocates of the rights of all those consenting adults in California who wish to engage in oral genital sex." (Pet. pp. 7-8.) The *Eisenstadt* decision provides an exception to the general rule that a litigant may not raise the constitutional rights of third parties. This exception depends upon the nature of the relationship between the litigant and those whose rights he seeks to assert and upon the impact of the litigation on third-party interest. *Eisenstadt v. Baird, supra,* 405 U.S. at 445-46. However, the interests of married persons, which petitioners seek to raise in their argument on the merits, will not be adversely affected by this litigation and there is no special relationship between petitioners and these third parties. Indeed, petitioners merely desire to avoid focusing upon the factual background of their commercial exploitation of sex.

It is clear that petitioners may not attack the constitutionality of section 288a on its face without reference to the details of the offense charged.

> "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines,* 362 U.S. 17, 21 (1960).

II

California Penal Code Section 288a Is Constitutional

Petitioners assert that California Penal Code section 288a is unconstitutional as being violative of the First, Ninth, and Fourteenth Amendments to the United States Constitution. (Pet. p. 5.) As a starting point, petitioners urge that given the zone of marital privacy created by *Griswold v. Connecticut,* 381 U.S. 479 (1965), the proscriptions of section 288a against oral copulation cannot constitutionally be applied to married people in the privacy of their bedroom. It has long been acknowledged that the right to privacy "encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child-rearing." *Paris Adult Theatre v. Slaton,* 413 U.S. 49, 65 (1973). However, the *Griswold* decision and the right to privacy do not protect the commercial exploitation of sex. "Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places." *Miller v. California,* 413 U.S. 15, 25-26 (1973). It is precisely these sexploitation films which petitioners were making for public distribution when they arranged the acts of oral copulation for which they were convicted.

Petitioner Tom Parker is also involved in another prosecution based upon almost identical facts. In reversing the trial court's action terminating his prosecution, the Court of Appeal for the State of California said:

> "The conduct referred to is that pertaining to the hiring and directing of professional performers

> to engage in acts of oral copulation in a semi-public place recorded by the camera for distribution to the general public through the media of the cinema. It is a reasonable inference that all involved including respondent expected to reap a financial return from the enterprise. The conduct of defendant may be defined as a form of commercial vice and not normal and natural sexual activity of consenting adults in private. Therefore we do not regard defendant's conduct as involving the exercise of a fundamental personal right protected by the Fourteenth Amendment." *People v. Parker,* 33 Cal. App. 3d 842, 848 [109 Cal. Rptr. 354, 358] (1973).

California courts have consistently upheld the constitutionality of Penal Code section 288a, and both state courts and federal courts have recently reaffirmed that stand. The California Court of Appeal in *People v. Drolet,* 30 Cal. App. 3d 207, 211-212 [105 Cal. Rptr. 824] (1973), upheld application of Penal Code section 288a to consenting adults, ruling that penal statutes proscribing illicit sexual contacts constitute a legitimate and proper exercise of the police power. *See also People v. Hurd,* 5 Cal. App. 3d 865, 876-77 [85 Cal. Rptr. 718] (1970). A similar result has been reached by the Court of Appeals for the Ninth Circuit in *Shaw v. Pitchess,* 440 F. 2d 412, 413 (9th Cir. 1971), affirming *Shaw v. Pitchess,* 324 F. Supp. 781 (C. D. Cal. 1969).

We agree with Chief Justices Earl Warren and Warren Burger that there is "a right of the Nation and of the States to maintain a decent society." *Paris Adult Theatre v. Slaton, supra,* 413 U.S. at pp. 56-60.

Penal Code section 288a and its application to the commercial exploitation of prohibited sex acts by petitioners, is one of California's efforts to maintain that society.

Conclusion

For the foregoing reasons, it is respectfully requested that the petition for writ of certiorari be denied.

Dated: This 5th day of March, 1974.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-998

TOM PARKER and MORRIE PARKER,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of California.

Petitioners' Brief in Reply to Respondent's Brief in Opposition.

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Petitioners' Brief in Reply to Respondent's Brief in Opposition.

Introductory Statement.

This Brief is being submitted in behalf of Petitioners Tom Parker and Morrie Parker in response to Respondents' Brief in Opposition in the within case and will deal only with those issues raised in said opposition.

Statement of Facts.

Petitioner does not dispute the statement of facts contained in Respondents' Brief except to note that the lengthy recitation of the nature and quantity of sexual activity contained in the films presented to the jury

below is clearly irrelevant to the issue presented by the instant petition.[1] That issue, simply stated, is whether a state may prohibit all of its citizens from engaging in acts of oral-genital sex.

Furthermore, counsel wishes to make it absolutely clear that the attorney referred to on page 5 of Respondents' Brief was Petitioners' former civil attorney, and not present counsel for Petitioner.

---

[1]As noted in our Petition for Writ of Certiorari, the jury found that all of the films which were the subject of the proposed sale were legally protected expression under the *Roth-Memoirs* test. It would appear, however, that Respondents' recitation of the sexual content of the films is intended simply as a device to divert this Court's attention from the plain language and meaning of Penal Code Section 288a, in the hope that the Court will fail to scrutinize the statutory proscription and react only to the obviously controversial content of the films.

ARGUMENT.

I

Petitioners Have Standing to Attack the Constitutionality of Penal Code Section 2882 on Its Face.

Respondent argues that Petitioners do not have standing to attack Penal Code Section 288a on its face for the reason that they cannot assert the rights of those married couples or consenting single adults in California who may wish to engage in oral-genital sex. In this regard, Respondent argues that "the interests of married persons, which Petitioners seek to raise in their argument on the merits, will not be adversely affected by this litigation and there is no special relationship between petitioners and those third parties." (Resp. Br. p. 7.)

Contrary to Respondents' assertion above-quoted, there can be no doubt but that the interests of married persons and consenting single adults will be, and are, adversely affected by this litigation, given the existence of Penal Code Section 288a which on its face makes it a felony punishable by up to 15 years in prison for *any* of such persons to engage in oral-genital sex. Likewise, the expert testimony developed during the pre-trial motion to dismiss, indicated that certain classes of people who suffer from spinal cord injuries are unable to engage in any kind of sex other than oral-genital sex. Thus, the continued existence of Penal Code Section 288a creates a situation whereby any physician or therapist in a veteran's administration hospital in California who advises a paraplegic of oral-genital sexual techniques, is in danger of conspiring to violate Section 288a. That such information and education is deemed necessary is clear in light of the pre-trial evi-

dentiary hearing, wherein a motion picture film, Petitioners' Exhibit "J", was introduced into evidence, which said film depicts paraplegic males discussing their sexual and psychological adjustment problems with their wives, and concludes with footage depicting a paraplegic male engaging in oral-genital sex with his able-bodied wife.

Lastly, this Court has consistently held that when a statute seeks to regulate conduct as vital as an adult citizen's right to choice of sex act, the statute must stand or fall on its face. Thus, this Court held in *Coates v. Cincinnati,* 402 U.S. 613, 91 S.Ct. 1686 (1971), that:

> "The ordinance before us makes a crime out of what under the Constitution cannot be a crime. It is aimed directly at activity protected by the Constitution. We need not lament that we do not have before us the details of the conduct found to be annoying. It is the ordinance on its face that sets the standard of conduct and warns against transgression. *The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech.*" *Coates v. Cincinnati, supra,* 616. (Emphasis added).

II

California Penal Code Section 288a Is Facially Unconstitutional.

Respondent argues that California's flat proscription against oral-genital sex for all citizens is constitutional without ever articulating any reason or rational basis for this contention. Instead, Respondent seeks to take

refuge in the fact that the statute is allegedly constitutional because it was used, in this instance, to prosecute a producer of "sexploitation films". However, Respondent neglects to note that the jury found that the films at bar were not obscene, despite the acts of oral copulation contained in each film. [A letter from the jury forewoman to the trial judge, explaining the jury verdict, is attached hereto as Appendix "A".]

Petitioner agrees that California could pass a statute prohibiting the filming of acts of oral copulation in light of *Miller v. California*, 413 U.S. 15 (1973). However, to date, California has not done so and the statute at issue, which was first enacted in 1921, was never intended to apply to motion picture films or film makers, but instead was and is intended to apply to all citizens. Thus, in *People v. Ragsdale*, 177 Cal.App. 2d 676, 677, 2 Cal.Rptr. 640 (1960), the California Court of Appeal noted that:

> "[T]he making of *unnatural sexual relations* a crime is embedded in the history of the common law and finds its sanctions in the broader basis of the settled mores of our western civilization." (Emphasis added.)

Respondent nowhere indicates in its Brief in Opposition that Penal Code Section 288a has been limited in any way so as to exclude application to married couples or single adults. It follows that "if the law is found deficient in one of these respects [vagueness or overbreadth], it may not be applied to him either, until and unless a *satisfactory limiting construction is placed on the statute*. The statute, in effect, is stricken down on its face. This result is deemed justified since the otherwise continued existence of the statute in

unnarrowed form would tend to suppress constitutionally protected rights." *Coates v. Cincinnati, supra,* 619-620. (Emphasis added.)

Finally, in arguing that Penal Code Section 288a is constitutional, Respondent not only overlooks the unimpeached record of the various experts called by Petitioner, who testified in substance that there is no rational basis for the statute at bar, they also overlook the testimony of the only two experts called at trial by the People, both of whom testified that there is nothing unnatural or abnormal about oral-genital sex among adults. [See Reporter's Transcript of trial testimony of Dr. Martin Reisen, p. 408, and Dr. Roy Madsen, p. 1021.]

Conclusion.

Petitioners were convicted, in the only case tried to a jury, of producing and directing a scene in a motion picture which said film was found by a jury to be constitutionally protected expression. Six defense experts and two prosecution experts all unanimously concluded that oral-genital sex is a normal sexual expression. The statute has never been narrowed or limited by California's highest court and its legislative history demonstrates that it was, and is, meant to apply to all citizens. Unquestionably, there is no rational basis justifying the continued existence of Penal Code Section 288a.

For the foregoing reasons, it is respectfully requested that the petition for Writ of Certiorari be granted.

Dated: This 18th day of March, 1974.

Respectfully submitted,

ANTHONY MICHAEL GLASSMAN,
Attorney for Petitioners.

APPENDIX "A."

May 25, 1972

Honorable David Eagleson
Dept. 44—Superior Court
111 N. Hill St.
Los Angeles, Calif. 90012

Re: Tom & Morrie Parker

Dear Judge Eagleson:

I had intended writing you at the conclusion of the Parker trial, but time and the daily exigencies have a subtle but sure way of thwarting our intentions. I wanted to express my appreciation for the privilege of sitting in your courtroom. It provided a great learning experience for me, and the benefits were all mine.

I admired your deft manuevering of the myriad procedural technicalities, and was particularly impressed with the logic of your remarks.

I am even more impelled to write you now, in anticipation of the impending sentencing of Tom and Morrie Parker, upon their release from the Chino facility. My motivation is basically that of a concerned citizen, stemming from my close involvement with the case. We were instructed not to consider the punishment aspect in the course of our deliberations, and we did not. I feel, however, that by bringing some facts to your attention at this time, you might be presented with some valid additional guidelines for subsequent review, prior to sentencing. The ultimate objective is that they have a bearing in your study and create a climate of thought favorable towards granting probation to the Parkers.

The verdicts, of course, are eloquent in themselves. I merely feel it would not be remiss to underscore them at this point in time.

We followed your instructions to the letter and felt they virtually decreed the decisions. We acquitted on Counts 1 and 2 because there was significant room for acquittal. On Counts 4 and 5, conviction was called for by the existence of Sect. 288-A. In this regard, we considered the law archaic, its validity questionable, and suspect, in itself. The overall opinion was that it should be repealed. Summarily, the verdicts were not popular ones, but we felt they were just.

Count 1 revealed an indicative thought barometer. On the initial balloting, our vote was 6 to 6. What followed were many long and loud hours, identifying and probing the issues, and applying the three prescribed criteria for determining obscene material. We could not find the films prurient within the framework of the pruriency definition as furnished by the court. As to "limits of social candor", with supportive testimony mainly in the form of surveys, we encountered doubt and skepticism regarding their manipulative structuring, possible built-in loopholes and apparent vulnerability, and had to profess to a diminution of their value and credence. With respect to "social redeeming importance", we acceded there could be an inherent entertainment or educational factor involved, however marginal. The synthesis of our evaluation dictated the films entitlement to protection. This relays only a capsule version of our appraisal of Count 1, but documents essentially the foundation for our decision.

While beholding their cause as something less than noble, we nevertheless had to acknowledge the legitimate rights of the defendants as businessmen engaged

in a profitable pursuit—selling a particular commodity to a particular segment of our society. We could prove no crime and could find no victim. The general feeling among us was that cases of this nature should not continue to consume the considerable time and talents of the courts, nor to dissipate the taxpayers' money.

We were an objective, thorough and diligent panel, charged with an awesome responsibility. We felt we fulfilled that responsibility with integrity and merit.

I earnestly solicit your thoughtful consideration of my comments.

Respectfully,

/s/ Molly Ackerman
Molly Ackerman